COPY

Office-Supreme Court, U.S.
FILED
JUL 24 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

NO. 291

UNITED STATES OF AMERICA, APPELLANT

v.

STANDARD OIL COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

EARL B. HADLOW
JOHN H. WILBUR
Attorneys for Appellee,
Standard Oil Company
P. O. Box 4099
Jacksonville, Florida

In the Supreme Court of the United States

OCTOBER TERM, 1965

NO. 291

UNITED STATES OF AMERICA, APPELLANT

v.

STANDARD OIL COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

Appellee, Standard Oil Company, moves the Court to dismiss this appeal on the grounds that (a) Appellant's Notice of Appeal was not served upon Appellee or its attorneys and (b) the Notice of Appeal does not include proof of service on Appellee as required by the Rules of the Supreme Court of the United States.

In the alternative, Appellee moves the Court to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I. APPELLANT'S NOTICE OF APPEAL WAS NOT SERVED UPON APPELLEE OR ITS ATTORNEYS AND DOES NOT INCLUDE PROOF OF SERVICE ON APPELLEE AS REQUIRED BY THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

The United States of America filed its Notice of Appeal in this cause on April 26, 1965, with the Clerk of the United States District Court for the Middle District of Florida. However, no copy of the Notice of Appeal was ever served upon, nor received by, Standard Oil Company or any of its attorneys, by mail or personal delivery or otherwise. While Standard Oil Company had received a copy of an unsigned letter dated April 26, 1965, from the Clerk of the District Court to the Clerk of this Court, transmitting an undescribed transcript, it remained in genuine ignorance of the fact that the Notice of Appeal had been filed or that Appellant intended to perfect or pursue its appeal until it received Appellant's Jurisdictional Statement on June 28, 1965. By virtue of Appellant's failure to serve the Notice of Appeal, this appeal has not been taken in conformity with Rule 10 of the Rules of the Supreme Court of the United States.

In addition, as there was no service of the Notice of Appeal upon the adverse party, there was no *proof* of service filed, as is clearly required by that portion of Rule 10 which provides:

> "The notice of appeal shall include proof of service on all adverse parties as prescribed by Rule 33. Failure to comply with these requirements shall be a sufficient reason for dismissing the appeal."

Rule 33 sets forth several methods by which proof of service may be shown, none of which were utilized by Appellant.

The Rule further provides:

> "Whenever proof of service is required by these rules, it must accompany or be endorsed upon the document in question at the time such document is presented to the clerk for filing."

Rule 5 of the Federal Rules of Civil Procedure, which requires service of all pleadings, has been given a strict and exacting construction by the various Circuit Courts of Appeal in connection with proof of service of documents.

In *Timmons v. United States,* 194 F.2d 357 (4th Cir. 1952), cert. den. 344 U.S. 844, 73 S.Ct. 59, 97 L.Ed. 656 (1952), the Circuit Court set forth its philosophy about the necessity for strict adherence to the requisites of service of pleadings upon the adverse party. The Court wrote:

> "In view of the important consequences that flow from the service of pleadings and other papers, the courts, quite rightly, have required the strictest and most exacting compliance with the rule when service is made by mail."

In addition, the Third Circuit has held, in determining the propriety of a motion for a new trial in a case in which the record contained no proof of service thereof, that the motion was not properly made and did not stay the running of the period for filing the notice of appeal. The Court stated:

> "The point we raise *sua sponte* is that unless service was made as prescribed by the rules, the notices of appeals were not filed within the appeal period prescribed by Rule 73(a). This court would then be

> without jurisdiction to adjudicate the appeals and they would have to be dismissed . . . . Service of motions as required by the rules must be demonstrable from the record on appeal and if such is not the case an appeal hereafter will be dismissed for want of jurisdiction."
>
> *Brest v. Philadelphia Transportation Co.*, 273 F.2d 22 (3rd Cir. 1959)

We respectfully submit, therefore, that the failure of Appellant to comply with the requirements of the rules of this Court is a sufficient reason for dismissing the appeal.

II. IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Under the Statute, the prohibited act is the discharge of "*refuse* matter of any kind or description" into the navigable waters of the United States. The District Court held that "the accidental discharge of valuable, usable oil . . . does not constitute a throwing, discharging or depositing of refuse matter, and is not a violation of the statute."

The alleged refuse was approximately 300 gallons of valuable aviation gasoline, accidentally spilled into a large river at a point where ocean going vessels are docked. It patently was not refuse of any sort or description. That aviation fuel is not refuse seems so obvious as to defy logical argument. Likewise, it is apparent that the use in the statute of the limiting word "refuse" was purposeful. Other, broader, descriptive words were always available and have been frequently used. Thus, in another part of the same statute, 33 U.S.C. 407, it is made unlawful to deposit "*material of any*

kind" upon a river bank where it may wash into navigable waters and impede navigation. By employing the word "refuse" in one clause and the word "material" in another, it is clear that a distinction is contemplated.

The "refuse" portion of the act was manifestly aimed at despoilers and was designed to prevent the use of our rivers as a convenient garbage disposal device. It seems equally plain that if the legislators had intended unlimited protection against any foreign matter, including the unintentional isolated spillage of valuable products, the statute would have employed the words "matter or material" rather than the limited word "refuse."

Since the latter portion of 33 U.S.C. 407 broadly prohibits the deposit on river banks of "material of any kind" which might be washed into navigable waters, (a violation only occurs if "navigation shall or may be impeded"), it is clear that the legislature contemplated a distinction between the word "refuse" and the word "material". Material is all inclusive. Refuse is limited to its normal and accepted meaning. Webster's New International Dictionary, 2nd Edition, Unabridged, defines the adjective "refuse" as follows: "refused; rejected; thrown aside or left as worthless or of no value; worthless; useless."

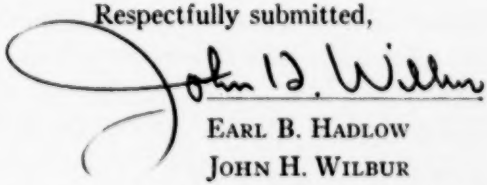
In its Jurisdictional Statement, Appellant contends that the question presented by its appeal is substantial because "the evident purpose" of the refuse act is to "protect navigation" and to achieve that protection the act must be construed to prohibit "the discharge into navigable waters of any foreign material". If that were in fact the true statutory

purpose then the prohibited act would have been the discharge of "any foreign material which impedes navigation" under which circumstance the narrower word "refuse" would not have been before this court. In this case, however, the result would have been the same under either approach, for the District Court held as a matter of fact that the acts of Appellee were "not such as to impede navigation, to damage property or to cause any fire or explosion".

Appellant's efforts to have this criminal statute construed broadly and liberally would result in the anomaly of criminal exposure to the driver of an automobile which accidentally skidded into a navigable stream or to the fisherman who accidentally lost his bait in navigable waters.

We submit that the issue involved in this case is *de minimis non curat lex*, and does not merit further argument. For these reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,



EARL B. HADLOW
JOHN H. WILBUR
Attorneys for Appellee,
Standard Oil Company
P. O. Box 4099
Jacksonville, Florida

CERTIFICATE OF SERVICE

I, John H. Wilbur, one of the attorneys of record for Standard Oil Company, Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of July, 1965, I served copies of the foregoing Motion to Dismiss or Affirm upon Appellant, United States of America, in compliance with Rule 33, paragraph 3(b), of the Rules of the Supreme Court of the United States, by mailing five (5) copies in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and by mailing an additional five (5) copies to Edward F. Boardman and William Hamilton, United States Attorney and Asst. United States Attorney respectively, Middle District of Florida, at 407 Post Office Building, Jacksonville, Florida.

John H. Wilbur

JOHN H. WILBUR
Attorney for Standard Oil Company
Post Office Box 4099
Jacksonville, Florida